Supreme Court, U.S.
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No. 01-1848

IN THE
Supreme Court of the United States

VICTORIA SMYTH, ET AL.,
Petitioners,

v.

SONIA RIVERO,
Commissioner of the Virginia
Department of Social Services,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITIONERS' SUPPLEMENTAL BRIEF UNDER RULE 15.8

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A NEW NINTH CIRCUIT DECISION CONCLUSIVELY DEMONSTRATES THAT THERE IS A POST-*BUCKHANNON* SPLIT ON THE QUESTION PRESENTED — WHETHER A PRELIMINARY INJUNCTION CAN EVER TRIGGER "PREVAILING PARTY" STATUS UNDER FEDERAL FEE-SHIFTING STATUTES.

On August 20, 2002, the United States Court of Appeals for the Ninth Circuit decided *Watson v. County of Riverside*, ___ F.3d ___, 2002 U.S. App. LEXIS 16693. That court summarized its ruling as follows:

> We hold today that a plaintiff who succeeds in obtaining a preliminary injunction can be deemed a "prevailing party" for purposes of 42 U.S.C. §1988, even though he did not recover other relief sought in the lawsuit.

This ruling is directly contrary to the Fourth Circuit's ruling below, which held that a preliminary injunction entered under circumstances indistinguishable from those in *Watson* "does not satisfy the prevailing party standard of §1988(b)." *Smyth v. Rivero*, 282 F.3d 268, 277 (2002), Appendix to Petition for a Writ of Certiorari, A-1, A-15. Indeed, under the Fourth Circuit's holding, there are no circumstances under which a preliminary injunction would make a plaintiff a prevailing party. Whether the Fourth Circuit erred on this point is the first of the questions presented for review by this Court in the Petition for a Writ of Certiorari.

The situation involved in *Watson* and *Smyth* is a common one. When a court enters a preliminary injunction, the

defendant often concedes the point and alters its conduct, *i.e.*, there is a "chang[e] [in] the legal relationship between [the plaintiff] and the defendant," *Buckhannon Board & Care Home v. West Virginia Dep't of Health and Human Resources*, 532 U.S. 598, 604 (2001), quoting *Texas State Teachers Assn. v. Garland Independent School Dist.*, 489 U.S. 782, 792 (1989). This is especially true if the court has found that the plaintiff is likely to succeed on the merits. When this happens, the case is typically dismissed without a final judgment, because the dispute is now moot. This is an often-repeated scenario, and it is very important, therefore, that the split in the approaches taken by the circuit courts to this issue be resolved by this Court.

In *Watson*, a police officer brought an action seeking to bar the use at an administrative personnel hearing of a written statement he had prepared. 2002 U.S. App. LEXIS 16693, at *2-4. He argued that his right to due process was violated when he was forced to prepare this statement without the opportunity to consult with an attorney. The district court issued a preliminary injunction prohibiting the County from using the statement at the hearing, and it was not used. Ultimately, the district court granted summary judgment to the County on most other issues, but concluded that Watson's claim for injunctive relief presented triable issues. Since the administrative hearing had been held and ended long before, however, the court determined that the due process issue was moot and did not enter any final injunction for Watson on that issue. In finding that Watson was the prevailing party, the district court concluded that he had

> achieved "some of the benefit [he] sought in bringing suit" by obtaining an injunction prohibiting the admission of the arrest report at the hearing. [Citing *Texas State Teachers*, 489 U.S. at 791-92]. Moreover, the injunction

> altered the legal relationship between the parties because it precluded the defendants from using the arrest report, which they otherwise would have been able to use, in the hearing.

2002 U.S. App. LEXIS 16693, at *5. The Ninth Circuit affirmed, stating "The district court did not err in ruling that Watson was a 'prevailing party' in these circumstances." *Id.*, at *7, because "Watson obtained significant, court-ordered relief that accomplished one of the main purposes of his lawsuit," *Id.* at *8.

The same analysis should apply here in evaluating whether Petitioners are "prevailing parties" because they also obtained their relief in this action as a result of a preliminary injunction awarded to them by the district court: They sought to keep the state from terminating their welfare assistance, and the district court, over the state's vigorous objection, ordered the state to continue the payments. The Petitioners then received those disputed benefits for over two years under the terms of that injunction, benefits the state ultimately conceded that the Petitioners would be entitled to keep. Put differently, if the Ninth Circuit rule had applied here, Petitioners would have been deemed "prevailing parties" eligible for a fee award.

The Ninth Circuit specifically considered the impact of *Buckhannon* and concluded that its decision was fully consistent with that case:

> A preliminary injunction issued by a judge carries all the "judicial imprimatur" necessary to satisfy *Buckhannon*. In this case, the County was prohibited from introducing Watson's report at the termination hearing for one reason and for one reason only: because Judge Timlin said so. . . .[U]nder *Buckhannon*, [Watson] was

> not a mere catalyst of an extra-judicial voluntary change in conduct. There was nothing voluntary about the County's inability to use the report.

2002 U.S. App. LEXIS 16693, at *10. Similarly, in *Smyth*, the state was prohibited from terminating the Petitioners' benefits "for one reason and for one reason only: because [the judge] said so." And, similarly, the Petitioners were not mere catalysts of "an extra-judicial voluntary change in conduct. There was nothing voluntary about" the state's decision to continue paying benefits to the Petitioners.

There is no question, therefore, that *Smyth* and *Watson* present the same issue regarding "prevailing party" status. And there is no question that those two decisions reached opposite conclusions.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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